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Supreme Court of the United States

October Term, 1938

No. [redacted]

ERIE COAL & COKE CORPORATION,
Appellant,

against

THE UNITED STATES.

Appeal From the Court of Claims.

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Court of Claims sustaining the demurrer of the Government to the appellant's amended petition and dismissing the petition.

The petition herein was filed in the Court of Claims February 26th and the amended petition March 14, 1923. The demurrer of the Government was filed March 26th. The case was argued and submitted April 3rd. April 16, 1923, the opinion of the Court of Claims (p. 17 *et seq.*) was filed and the judgment of the Court was that day entered (p. 22).

Statement.

The petitioner in this case alleges in substance that in the exercise of the authority and discretion vested in him by the Act of July 11, 1919 (41 Stat. L., 105), conferring the right, power and authority to sell any surplus supplies in the possession of the War Department to any corporation or person upon such terms as to him

might seem best, the Secretary of War caused to be published and circulated an advertisement for the sale, at public auction, of approximately 40,000 tons of sodium nitrate, located at certain designated Ordinance Reserve Depots; that the Secretary, by Robert Fox, his duly appointed auctioneer, offered these lots of sodium nitrate located at these places; that the sale was largely attended by more than one hundred prospective bidders and interested persons; that the sodium nitrate was surplus material in possession of the Government for the use of the War Department; that the appellant bid an aggregate of $711,500 for three lots; that the appellant was the highest bidder at this auction sale for these three lots and the same was knocked down and sold to appellant for this sum upon the terms and conditions in the circular advertisement of auction sale (Appellant's Ex. B, p. 11); that pursuant to the advertised terms of sale the appellant deposited with the Ordinance Department of the War Department, United States bonds and certificates of bank deposit for more than 10 per cent. of the bid price; that its deposits were accepted as part payments and Government receipts issued to it therefor; that plaintiff held itself ready, able and willing to perform all the terms and conditions and undertakings by it agreed to be performed and offered so to perform, and demanded that the Secretary of War sign and enter into a written agreement of sale in accordance with the terms set forth in the notice and conditions of sale (Ex. B); that the Secretary of War refused claimant's said offer of performance and failed, refused and neglected to comply with its said demands stating his reason for his refusal that in his opinion the aforesaid price of $25 per ton for said sodium nitrate was inadequate; that after the Secretary of War had thus declined to execute a written contract, the Government bonds and certificates of bank deposit which had been deposited with the Ordinance Department at the time the bids

were made were returned to and accepted by plaintiff without prejudice to any of its claims or rights against the Government of the United States.

It alleges the fair market value of the sodium nitrate thus purchased and prays damages for the difference between the bid price and the market value in the sum of $1,208,370.

It states the usual several formal allegations of loyalty, etc.

The Government demurred on the ground that the petition did not allege a cause of action against the United States, thereby admitting all these allegations of the petition.

The Court below sustained the demurrer and directed and entered judgment finally dismissing the petition.

POINT I.

The Act of July 11, 1919 (41 Stat. L. 105) conferred upon the Secretary of War, authority to sell sodium nitrate at public auction.

The opinion of the Court of Claims intimates that the Act of July 11, 1919 (41 U. S. Statutes), relied upon by the appellant, did not authorize the Secretary of War to sell the sodium nitrate which the petitioner purchased at public auction. The act reads as follows:

> "The Secretary of War be, and he is hereby authorized to sell any surplus supplies including motor trucks and automobiles now owned by and in the possession of the Government for the use of the War Department to any state or municipal subdivision thereof, or to any corporation or individual upon such terms as may be deemed best."

The petition alleges, and the Government's demurrer admits, that the sodium nitrate was "surplus supplies in possession of the Government for the use of the War Department" (Petition, p. 1).

This act of July 11, 1919, is commonly known as the third enabling act, and is the authority under which the Secretary of War has disposed of millions of dollars worth of surplus supplies, both by sealed bid and by public auction. Its language leaves to the Secretary the right in his discretion to determine the method of sale. The language is so broad that it is inconceivable that there could be raised a question as to his authority to sell by public auction.

POINT II.

Title to property sold at public auction without reserve, passes with the fall of the auctioneer's hammer.

That title passes with the fall of an auctioneer's hammer, is an elementary principle of law, now immemorial in English and American jurisprudence.

> "When the hammer of the auctioneer fell on the bids of the claimant they constituted acceptances by the defendant, completed binding contracts of sale and passed titles to plaintiff."
>
> *Paige* v. *Cave*, 3 T. R., 148;

and see

> Benjamin on Sales, 6th Ed. (1920), 86;
> Story on Sales, Section 461;
> 3 A. & E. Encylopedia Law, 2nd Ed., p. 501;
> *Blossom* v. *R. R.*, 3 Wall., 196, p. 206;
> *Goldberg* v. *Meyer*, 37 App. Cases, D. C., 282, S. C., under name *Goldberg* v. *Daniels*, 231 U. S., 218.

The opinion of the Court of Claims appears, however, to make an exception to this ancient doctrine in the case at bar. In the opinion of the Court below (p. 20), it is said:

> "It may be conceded that in an ordinary auction sale the rule as stated by plaintiff generally prevails that 'as soon as the hammer falls' the bargain is considered as concluded. But in sales under a statute such as we are considering, or in the absence of statutory authority with appropriate regulations governing the same, a sale of Government property is not affected by the 'fall of the hammer.'"

Not only is this new exception to well established doctrine expounded by the Court below without precedent or authority, but it is clearly opposed to another well established principle of law expounded by the same Court, as follows:

> "When the United States enters into a contract with a citizen the elementary principles of contractual relations govern. The instrument which evidences the reciprocal obligations of the parties thereto is in no wise exceptional, and no greater privileges are to be accorded the United States under the circumstances than accrue to individuals similarly situated" (BOOTH, *J.*).
>
> *American Lithographic Co.* v. *United States*, 57 Ct. Cl., 340, p. 351.

> "If it (the United States) comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the laws that govern individuals there (*Cooke* v. *United States*, 91 U. S., 398)."
>
> *Purcell Envelope Co.* v. *United States*, 51 Ct. Cl., 211, aff'd 249 U. S., 313.

POINT III.

The sale as advertised and conducted, was a public auction without reserve.

The appellant's petition has incorporated by reference the advertisement of sale (Exhibit A, p. 10) and the terms of sale (Exhibit B, p. 11), and it is to these that the opinion of the Court below refers, as follows:

> "The advertisement of sale, we think, notified persons submitting bids that they were subject to approval" (p. 21).

The attention of this Court is respectfully drawn to the two exhibits, A and B.

The advertisement and terms of sale contain not a single specific word upon the subject of any reservation of right of review or approval, and not even a remote suggestion of any reserved right of rejection.

It is respectfully submitted that after reading over these terms appellant was justified in concluding that it was attending an ordinary public auction; and that when the hammer fell upon its bids on three separate lots of sodium nitrate and its money was accepted and receipts given therefor, that it had purchased nitrate which it would receive from the Government. It is respectfully submitted that these terms are not capable of the strained interpretation placed upon them by the Court of Claims, and nowhere contain any provision which authorized or justified the Secretary of War to refuse to comply with the appellant's demands because in his opinion the prices bid were inadequate.

The Secretary had exercised his full measure of discretion under the statute when he publicly announced:

"SODIUM NITRATE
(APPROXIMATELY 40,000 TONS)
TO BE SOLD BY AUCTION, THURSDAY, APRIL
13TH, 1922, 10 A. M. EASTERN TIME
AT WASHINGTON, D. C."

(See Exhibit A, p. 10.)

It is true he could have withdrawn *lots*, or even called off the entire sale, but in that event there would have been no *purchaser* with rights to be violated. *If he intended to reserve a right to reject bids after acceptance the language would have to be unequivocal.*

So far from supporting the interpretation of the Court of Claims, the plain language of the advertisement and terms refutes everything stated in the opinion.

Fairly construed, the advertisement and terms (Exhibits A and B, pp. 10, 11) *substantiate the appellants cause of action.*

In the Court below the Government laid stress upon the following paragraph from the terms of sale, and it would appear that the opinion of the Court of Claims has been influenced by it:

> "Acceptance by the Government of any bid will not be final until the execution of a contract and bond and upon failure by the purchaser within ten days after notice of the acceptance of his bid to execute said contract the Government may withdraw such acceptance and make such disposition of said nitrate as it may desire free of any claim of purchaser in which event the 10% theretofore paid upon the acceptance of said bid shall be forfeited to the United States as liquidated damages" (p. 13).

[After the word "bond" in the first sentence of this language there is no comma. In respondent's brief below and in the opinion of the Court below this comma has been inserted.]

The meaning of the above stated sentence is elucidated by the preceding two sentences of the same paragraph, which read as follows:

> "Bidders will be required and should come to the sale prepared to make a deposit in the form of cash or certified checks made payable to the Treasurer of the United States in the amount of 10% of the purchase price of nitrate purchased. (U. S. Government bonds at par value will be accepted in lieu thereof.) This deposit will be retained by the United States to apply against the last shipment of sodium nitrate on the contract with the purchaser."

The appellant attended the sale, together with over one hundred other bidders (Petition, pp. 5, 1); on three separate lots of sodium nitrate the auctioneer's hammer fell upon its bids, and on each occasion it complied with the terms of sale and deposited the required 10%, and was given receipts (Exhibits C and D, pp. 15, 16).

These facts were before the Court of Claims, admitted by the demurrer, yet the opinion of the Court below states:

> "The most that can be claimed for the bids at the alleged auction sale is that they were proposals which the Secretary could accept, and until they were duly accepted by him there was no approval of them, and consequently no sale."

The appellant submits that even an interpretation replete with liberality toward the Government cannot be strained to justify such an opinion. But if it were possible to cast a doubt upon the meaning of the terms, the appellant would still be entitled to have them construed in its favor, under the well established rule that words and phrases of doubtful meaning should be construed against the party who composed them.

But it is not necessary to indulge in strained interpretations to analyze the meaning and arrive at the clear intent of the terms of sale.

Bidders were notified to "come to the sale prepared to make a deposit—in the amount of 10% of the purchase price of nitrate purchased" (p. 13). It would seem self-evident that the bidder, so depositing, had *purchased* nitrate. The next sentence then states, "This deposit will be retained by the United States to apply against the last shipment of sodium nitrate on the contract with the purchaser" (p. 13). It would now appear that not only had the bidder become a *purchaser*, but as a purchaser he had made a *part payment*. For this part payment the purchaser was properly given a receipt (Exhibits C and D) and the auction sale was over. The sale now being over, the appellant, who was one of the successful bidders, was a *purchaser* and held Government receipts for a *part payment* on its purchase.

It is respectfully submitted that this view of the appellant's status at the close of the auction sale on April 13th is the result of a fair and reasonable interpretation of the language used in the terms of sale and is completely upheld by the fact that *nowhere in the advertisement or terms of sale will there be found a provision for the return of a purchaser's 10% part payment.* The reason is obvious; the sale was intended to be, and actually was, an absolute and final auction sale without reserve.

It will be noted that the language of the terms quoted above and interpreted by the appellant, all precedes the sentence relied upon by the Government and the Court below, as authority for the rejection of the appellant's bids by the Secretary of War. This fact is important in determining the clear intent of the sentence under discussion, which reads as follows (p. 13):

> "Acceptance by the Government of any bid will not be final until the execution of a contract and bond and upon failure by the purchaser within ten days after notice of acceptance of his bid to execute said contract, the Government may withdraw such acceptance and make such disposition

of said nitrate as it may desire, free of any claim of purchaser in which event the 10% theretofore paid upon the acceptance of said bid shall be forfeited to the United States as liquidated damages."

It is obvious that the foregoing sentence (following, as it does the sentences previously quoted, the fair ininterpretation of which give to the appellant the status of a *purchaser* at the close of the sale), was merely intended to define the further obligations of the appellant as a *purchaser* and the rights of the Government if the *purchaser* defaulted in these obligations.

It is admitted that the appellant made no default whatsoever in performing its obligations.

Yet, the Secretary of War, after the purchase and sale, and after the appellant had made the required part payment, notified the appellant that its three bids were rejected.

It is respectfully submitted that to construe the sentence under discussion, as the Court below has done, is to distort and invert the language used.

The language of this sentence is not only a penal provision but it was prepared by the Government, and for both these reasons under the well-established doctrines of the law is to be strictly construed against the Government.

The appellant contends that its meaning is clear; that it was inserted to define a *purchaser's* obligation after the sale, and to provide a penalty for a default in that obligation; that this default was a condition precedent to a right that would arise in favor of the Government, *i. e.*, a right, not to reject the bid, but to "*withdraw*" such acceptance, "and make such disposition of said nitrate as it may desire free of any claim of purchaser in which event the 10% theretofore paid upon the acceptance of said bid shall be forfeited to the United States as liquidated damages;" that when right of the

Government "to withdraw such acceptance" was expressly limited in the terms to occur upon the happening of one specifically stated contingency, *i. e.*, "failure by the purchaser within ten days" to execute the contract, the Government is foreclosed by all the known doctrines of construction, from asserting the right of withdrawal in any other contingency.

In the Court below it was argued that the sentence now under discussion gave to the Secretary of War a final right of review and meant that the successful bidder had nothing whatever until the bid was accepted in a written contract. The argument is untenable. The sentence in plain words affirms the fact that an acceptance has already been made, and it is obvious that the first part was intended solely to set out what the purchaser had to do, *i. e.*, execute a "contract and bond." The use of the words "and bond" clearly shows that reference was made to the purchaser's obligation only.

To construe the language used in the sentence under discussion, contrary to the views of the appellant herein, impels a successful bidder at the sale into a situation truly anomalous and a status undefined in law. Such a bidder would be a purchaser, as defined in the Government's terms, yet owning nothing and having no right to complete his obligation and receive the goods for which he had partly paid. Neither could he change his mind without loss, because the Government had his money and might retain it as a penal forfeiture. And this is not all. The Government could sue him for its damages resulting from his failure to complete the transaction. Such an interpretation repudiates essential mutuality and is pregnant with injustice.

The argument as to the complexity of the contract with this appellant ill-befits the numerous publications pointing out how easy it is to buy from the War Department.

The Court below says the Secretary did not consider the sale complete. As showing the Department's view of auction sales, the Court will take notice of its official advertisements.

In one of its circulars, under bold caption "METHODS OF SALE—AUCTION," it states:

> "Every business man is familiar with all the methods of sale employed by the War Department in disposing of its surplus,"

and under another large caption "IT IS EASY TO BUY FROM THE WAR DEPARTMENT," it says:

> "There seems to be an idea in the minds of some, who have not participated in these sales of Army surplus, that buying from the War Department entails bother and uncertainty. Such a belief is erroneous. All offerings are catalogued in detail. Honest descriptions of quantities and qualities are given. Every facility is afforded for inspection before purchase. The terms of sale are simple, and purchase resembles nothing so much as an ordinary, everyday, 'over the counter' transaction.
>
> "Buying at these sales is placed on the democratic basis of an equal opportunity for all.
>
> "The auctioneer's hammer knows no favorites; the sanctity of the sealed bid is preserved inviolate, and the fixed price on individually sold articles is one price to all.
>
> "The various methods of sale, too, offer opportunities to purchase in a manner convenient to you."

Proceeding in this same circular, it advertises:

> "Accordingly, the War Department was ordered to dispose of its surplus materials, and this it is doing by auction sales, by sealed bid offerings, and by sales at fixed prices. Its selling campaign is unique in that the profits are all on the side of the purchaser. The quality of the

> materials offered and the democratic method of selling put the big advantage in the buyer's hands. He is enabled to take unusual profits, because the Government *must* sell."

Since *Paige* v. *Cave*, 3 T. R., 148, and even up through the advertisement of the War Department, it has been the doctrine that the auctioneer's hammer knew no favorites, and yet here, for some unknown reason the attempt is made to cancel the sale to this purchaser without apparently questioning any of the other sales.

And yet it is argued and held that language authorizing a withdrawal of acceptance of his bid and enforcement of a forfeiture against him in event of one specified default implies a reservation of a right to the Secretary to reject his bid at his discretion for any reason.

POINT IV.

The appellant, as a matter of law, is entitled to damages.

The appellant insists that when the hammer fell upon its bids, a purchase and sale was made; that when its deposit was accepted, a part payment was made; that thereupon, having fully complied with all the terms, it and the Government were firmly bound to complete the transaction by the execution of a contract within ten days.

This obligation is clearly and definitely set forth in the terms of sale (Exhibit B, p. 14) as follows:

> "Purchaser will be required upon acceptance of his bid and before delivery of nitrate to enter into a written contract embodying the following terms, and to give a bond in double the amount of his bid, with surety acceptable to the Secretary of War, conditioned upon the faithful performance of the terms of said contract."

In the face of this language it is argued, and is held by the Court below, that the Government was not under an obligation to execute the contract. If the purchaser was required to execute the contract, it would seem too obvious for argument that the Government holding the purchaser's 10 per cent. part payment under a penal forfeiture provision, was likewise bound and required to execute the contract with the appellant.

It is admitted that the appellant was ready, willing, and able to enter into the contract, and that it duly demanded that the Secretary of War do likewise. The Secretary of War refused to execute the contract or to deliver the nitrate, and this failure and refusal is the gravamen of the appellant's cause of action.

That the appellant is entitled to damages under these circumstances seems clear under numerous decisions made or affirmed by this Court.

In *Garfielde* v. *United States*, 11 Ct. Cl., 592 (p. 601), it is said:

> "The petitioner brings this action to recover damages for non-fulfillment on the part of the defendants of the contract which he maintains was made with him by the Postmaster-General by the acceptance of his proposal. It has frequently been held that when a bid has thus been accepted and the bidder is ready, willing and able to perform his part of the engagement, the other party, accepting the bid and refusing to enter into a formal, written contract, is liable to the same extent as he would have been had the contract been written out in full and signed by both parties (*Adam's* case, 1 C. Cls. R., p. 192; *Mayer's* case, 5 Ct. Cls. R., p. 317; *Tayloe* v. *Merchants' Fire Insurance Company*, 9 How., 390; *Mactier's Admr.* v. *Frith*, 6 Wend., 103; *Pratt* v. *The Hudson River Railroad Company*, 21 N. Y. Court of Appeals, 305)."
>
> "The defendants are therefore liable in this action if the Postmaster-General had authority

under the law and regulations to accept, as he at first, did the claimant's bid. When once lawfully accepted the contract would become binding on both parties, and the action of the Postmaster-General afterward, in refusing to acknowledge it and to perform his engagements thereby made, would be wrongful, and the claimant would be entitled to damages."

Affirming the Court of Claims in the *Garfielde* case, 93 U. S., 242, this Court says (p. 244):

> "The Court of Claims holds that the proposal on the part of Garfielde and the acceptance of the proposal by the department, created a contract of the same force and effect as if a formal contract had been written out and signed by the parties. Many authorities are cited to sustain the proposition. We believe it to be sound, and that it should be so held in the present case."

This Court has further held:

> "It makes no difference that the contract was not formally signed or the bond formally approved, as counsel for the Government contends they should have been, both by the terms of the contract and by a statute of the United States (28 Stat., 279). Their formal execution, as we have seen, was not essential to the consummation of the contract. That was accomplished, as was decided in the *Garfielde* case, by the acceptance of the bid of the Envelope Company and the entry of the order awarding the contract to it."
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> *Purcell Envelope Co.* v. *United States,* 249 U. S., 313, p. 329.

POINT V.

The judgment should be reversed and assessment of damages directed.

Respectfully submitted,

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